Supreme Court, U.S.
FILED
98 27 MAY 12 1998
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

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DAVID L. SMITH,

Petitioner,

v.

SUPREME COURT OF THE STATE OF COLORADO,

Respondent.

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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DAVID L. SMITH

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PRO SE ATTORNEY-PETITIONER

80 pp

## QUESTIONS PRESENTED FOR REVIEW

Whether since the federal judiciary has clearly demonstrated that it has no intention of reviewing, rehearing, reconsidering, amending, modifying, vacating, or correcting the harsh and unjustified sanctions and discipline previously imposed against Mr. Smith by the Tenth Circuit, the District Court and their disciplinary panels, it is impossible for him to demonstrate prior to reinstatement that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted, as required by the Colorado Supreme Court in its (March 3, 1997) opinion, or to file with committee counsel the affidavit required by C.R.C.P. 241.22(b).

Whether by issuing its order summarily denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado, the Colorado Supreme Court arbitrarily deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fourteenth Amendment right to due process of law.

Whether the Colorado Supreme Court also arbitrarily deprived Mr. Smith of his First and Fourteenth Amendment right to access to the courts to petition the government for a redress of grievances.

Whether since no other attorney has been suspended indefinitely from the practice of law in the State of Colorado based on his financial inability to pay more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the federal courts, the Colorado Supreme Court arbitrarily deprived Mr. Smith of his Fourteenth Amendment right to the equal protection of the laws.

Whether since no legal or factual basis existed for the Colorado Supreme Court's order denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado, it was reasonably questionable whether the Colorado Supreme Court could be a fair and impartial decision-maker in this disciplinary case against him, in violation of his Fourteenth Amendment right to due process of law.

Whether by issuing its order summarily denying Mr. Smith's petition for rehearing of its order summarily denying his verified motion for order reinstating him to the practice of law in the State of Colorado, the Colorado Supreme Court again deprived him of his First and Fourteenth Amendment rights.

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In the Matter of David L. Smith, Disciplinary Action No. 93-DP-28 (D. Colo.), cert. denied, ____ U.S. ____, 117 S.Ct. 359, 136 L.Ed.2d 251 (1996).

People v. Smith, 937 P.2d 724 (Colo.), cert. denied, ____ U.S.____, 118 S.Ct. 158, 139 L.Ed.2d 103 (1997).

People v. Smith, Case No. 96SA306 (Colo.) (Order of Court dated February 11, 1998).

People v. Smith, Case No. 96SA306 (Colo.) (Order of Court dated February 19, 1998).

## JURISDICTION

The orders sought to be reviewed were entered on February 11, 1998 and February 19, 1998. Rehearing of the Colorado Supreme Court's (February 11, 1998) order summarily denying Mr. Smith's motion for order reinstating him to the practice of law in the State of Colorado was summarily denied by order dated February 19, 1998.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the Colorado Supreme Court's orders of February 11, 1998 and February 19, 1998 is 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Amendment I of the Constitution of the United States provides in relevant part as follows:

> Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.

Amendment XIV, Section 1 of the Constitution of the United States provides in relevant part as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his Petition for a Writ of Certiorari to the Colorado Supreme Court:

## I. STATEMENT OF THE CASE

On November 29, 1993, the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Stephanie K. Seymour, Chief Judge, and Bobby R. Baldock and Wade Brorby, Circuit Judges) issued its order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals in four federal civil rights cases,[1] and for his failure to

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[1]Mr. Smith denies that the appeals he filed from the United States District Court for the District of Colorado to the Tenth Circuit were "frivolous." See McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (per curiam) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent). By refusing to hold a hearing, at which Mr. Smith would have the opportunity to present expert testimony and other relevant evidence on this issue--a blatant and egregious violation of Fed. R. App. P. 46--the Tenth Circuit disciplinary panel deprived him of his liberty and property interests in his

comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the District Court,[2] all in alleged violation of the

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good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law. See Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland v. Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

[2]Because the disciplinary sanctions imposed against Mr. Smith (i.e., indefinite suspension from the practice of law in the Tenth Circuit) were "punitive, to vindicate the authority of the court," rather than "remedial, and for the benefit of the complainant," they were criminal rather than civil in nature; and he was therefore entitled to a full criminal process (including his Sixth Amendment right to a jury trial) before being convicted and punished by the Tenth Circuit disciplinary panel for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the

ABA Code of Professional Conduct.[3] See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been "satisfied."[4] See id.

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District Court. See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). Further, as a matter of equal protection of the laws, Mr. Smith should not have fewer constitutional rights merely because he was convicted and punished in attorney disciplinary proceedings rather than in criminal contempt proceedings.

[3]Mr. Smith denies that he violated the ABA Code of Professional Conduct.

[4]As a part of his efforts to persuade the Tenth Circuit disciplinary panel to review, reconsider and correct its (November 29, 1993) suspension order,

On February 10, 1995, the three-judge disciplinary panel of the United States District Court for the District of Colorado (composed of United States District Judges Zita L. Weinshienk, Edward W. Nottingham and Daniel B. Sparr) issued its order indefinitely suspending Mr. Smith from the practice of law in the District Court based on the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order.[5] See In the Matter of

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Mr. Smith submitted affidavits and other evidentiary materials showing that he was financially unable to pay all or any part of the more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the District Court. At the time of the submission of these evidentiary materials, Mr. Smith had a negative net worth of more than $360,000.00. Currently, Mr. Smith has a negative net worth of more than $400,000.00. Due to his indefinite suspension from the practice of law in the federal and state courts, Mr. Smith has no income from which his negative net worth could be reduced, or from which harsh and unjustified sanctions of more than $50,000.00 could be paid.

[5]By automatically enforcing the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order,

David L. Smith, Disciplinary Action No. 93-DP-28 (D. Colo.), cert. denied, ____ U.S. ____, 117 S.Ct. 359, 136 L.Ed.2d 251 (1996). Mr. Smith may apply for reinstatement to the District Court bar "when the United States Court of Appeals for the Tenth Circuit lifts its suspension of Mr. Smith." See id.

On March 3, 1997, the Colorado Supreme Court issued its opinion (effective June 6, 1997) suspending Mr. Smith from the practice of law in the State of Colorado for nine months based on the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order. See People v. Smith, 937 P.2d 724 (Colo.), cert. denied, ____ U.S. ____, 118 S.Ct. 158, 139 L.Ed.2d 103 (1997). Prior to reinstatement, Mr. Smith must demonstrate that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted.[6] See id.

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which is transparently invalid, the District Court disciplinary panel violated Mr. Smith's Fifth Amendment right to due process of law. See In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

[6]Mr. Smith is therefore being subjected to an indefinite suspension

On February 11, 1998, the Colorado Supreme Court issued its order summarily denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado, despite the fact that it is impossible for him to comply with the Colorado Supreme Court's (March 3, 1997) opinion or to file with committee counsel the affidavit required by C.R.C.P. 241.22(b), which provides that:

> [A] lawyer who has been suspended for a period of one year or less shall be reinstated by order of the Supreme Court, provided the lawyer files with the Committee Counsel within 30 days prior to the expiration of the period of suspension an affidavit stating that the lawyer has fully complied with the order of suspension and with all

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from the practice of law in the State of Colorado, in violation of C.R.C.P. 241.7(2), which provides that:

> Suspension is the temporary suspension by the Supreme Court of a lawyer's license to practice law in this state, subject to readmission as provided by C.R.C.P. 241.22(a). Suspension shall be for a definite period of time not to exceed three years.

applicable provisions of this Chapter.

On February 19, 1998, the Colorado Supreme Court issued its order summarily denying Mr. Smith's petition for rehearing of its order summarily denying his verified motion for order reinstating him to the practice of law in the State of Colorado.

## II. ARGUMENT

In his verified motion for order reinstating him to the practice of law in the State of Colorado, Mr. Smith argued that since the federal judiciary has clearly demonstrated that it has no intention of reviewing, rehearing, reconsidering, amending, modifying, vacating, or correcting the harsh and unjustified sanctions and discipline previously imposed against him by the Tenth Circuit, the District Court and their disciplinary panels, it is impossible for him to demonstrate prior to reinstatement that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted, as required by the Colorado Supreme Court in its (March 3, 1997) opinion, or to file with committee counsel the affidavit required by C.R.C.P. 241.22(b). See Maggio v.

Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948) (impossibility of performance constitutes a defense to contempt); United States v. Rylander, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983) (the court must consider present inability to comply with the order in question); Tinsley v. Mitchell, 804 F.2d 1254, 1256 (D.C. Cir. 1986) (citing Maggio v. Zeitz). Therefore, by issuing its order summarily denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado, the Colorado Supreme Court arbitrarily deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fourteenth Amendment right to due process of law. See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985);

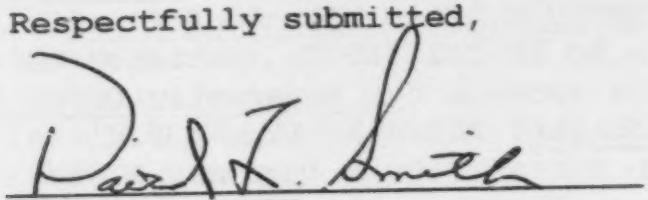
Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Johnson v. Board of County Commissioners, 85 F.2d 489 (10th Cir. 1996). The Colorado Supreme Court also arbitrarily deprived Mr. Smith of his First and Fourteenth Amendment right to access to the courts to petition the government for a redress of grievances. See NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976), citing Harbolt v. Alldredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972). Since no other attorney has been suspended indefinitely from the practice of law in the State of Colorado based on his financial inability to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the federal courts, the

Colorado Supreme Court arbitrarily deprived Mr. Smith of his Fourteenth Amendment right to the equal protection of the laws. See Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); Bodie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Since no legal or factual basis existed for the Colorado Supreme Court's order denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado, it was reasonably questionable whether the Colorado Supreme Court could be a fair and impartial decision-maker in this disciplinary case against him, in violation of his Fourteenth Amendment right to due process of law. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decision-maker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971)

(Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decision-maker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decision-maker "give vent to personal spleen or respond to a personal grievance" in reaching a decision); Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Finally, by issuing its order summarily denying Mr. Smith's petition for rehearing of its order summarily denying his verified motion for order reinstating him to the practice of law in the State of Colorado, the Colorado Supreme Court again deprived him of his First and Fourteenth Amendment rights. See Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). Under these circumstances, the Colorado Supreme Court has decided an important federal question in a way that conflicts with the decision of a United States court of appeals, and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Mr. Smith therefore requests this Court

to grant his Petition for a Writ of Certiorari to the Colorado Supreme Court.

Respectfully submitted,



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APPENDIX

In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994) ..... A-3

In the Matter of David L. Smith, Disciplinary Action No. 93-DP-28 (D. Colo.), cert. denied, ____ U.S. ____, 117 S.Ct. 359, 136 L.Ed.2d 251 (1996) ..... A-6

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People v. Smith, Case No. 96SA306 (Colo.) (Respondent's Verified Motion for Order Reinstating Him to the Practice of Law in the State of Colorado Despite the Fact that it is Impossible for Him to Comply with the Colorado Supreme Court's (March 3, 1997) Opinion or to File With Committee Counsel the Affidavit Required by C.R.C.P. 241.22(b), dated February 4, 1998) ..... A-30

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PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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IN RE: )
)
) No. 93-631
DAVID L. SMITH )

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Order
Filed November 29, 1993

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Before SEYMOUR, BALDOCK and BRORBY, Circuit Judges.

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Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific Corp., ____ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the court
PER CURIAM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Disciplinary Action No. 93-DP-28

IN THE MATTER OF DAVID L. SMITH

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DISCIPLINARY ORDER

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On February 2, 1995, this matter was heard before the Disciplinary Panel of this Court. After hearing arguments and statements of counsel, reviewing all transcripts, exhibits and other documents in this matter, and considering carefully the issues, it is

ORDERED that identical discipline will be imposed by the United States District Court as was imposed by the United States Court of Appeals for the Tenth Circuit. It is

FURTHER ORDERED that David L. Smith is suspended as a member of the Bar of this Court. It is

FURTHER ORDERED that when the United States Court of Appeals for the Tenth Circuit lifts its suspension of Mr. Smith, he shall be required to apply for reinstatement in accordance with D.C.COLO.LR 83.6N. of the Local Rules of Practice of this court. It is

FURTHER ORDERED that David L. Smith shall forward his certificate of admission to the Clerk of the Court within ten days from the date of this Order and that he shall in no way hold himself out as an attorney admitted to practice in this court be it by use of letterhead, business cards, advertisement or any other manner.

Dated at Denver, Colorado this 10th day of February, 1995.

BY THE DISCIPLINARY PANEL OF THE COURT:

_____

ZITA L. WEINSHIENK, Judge

_____

Edward W. Nottingham, Judge

_____

Daniel B. Sparr, Judge

SUPREME COURT OF COLORADO
No. 96SA306 March 3, 1997

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THE PEOPLE OF THE STATE OF COLORADO,
Complainant,

v.

DAVID LEE SMITH,
Attorney-Respondent.

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Original Proceeding in Discipline

EN BANC ATTORNEY SUSPENDED

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Linda Donnelly, Disciplinary Counsel
James C. Coyle, Assistant Disciplinary Counsel
Denver, Colorado

Attorneys for Complainant

David Lee Smith, Pro Se
Denver, Colorado

PER CURIAM

This is a reciprocal discipline proceeding arising from the respondent's discipline by the United States Court of Appeals for the Tenth Circuit (court of appeals). The court of appeals suspended the respondent from practicing before it for an indefinite period, with reinstatement contingent on the respondent's paying sanctions imposed against him by the court of appeals and the United States District Court for the District of Colorado (district court). A hearing panel of the supreme court grievance committee approved the findings and recommendation of a hearing board that the respondent be suspended from the practice of law for nine months; that prior to reinstatement he demonstrate that all sanctions imposed by the court of appeals and the district court have been satisfied that all federal suspensions have been lifted; and in the event that the respondent meets those conditions prior to the expiration of the nine-month suspension, that this court give favorable consideration to the respondent's immediate reinstatement. The respondent has filed exceptions to the panel's action. We accept the hearing panel's and hearing board's recommendations.

I.

The respondent was admitted to practice law in Colorado in 1975. Based on the respondent's testimony and the

record, which included the record of the proceedings in the court of appeals, the hearing board concluded that the following had been proven by clear and convincing evidence.

On September 15, 1993, the court of appeals issued an order to the respondent to

> show cause in writing why he should not be fined, disbarred or otherwise disciplined for his actions in numbers 93-1070 and 93-1139, Deherrera v. Denver, [7 F.3d 1044 (10th Cir. 1993)] after the entry of this court's orders in Sandlin v. Canady (In re Canady), [993 F.2d 1551 (10th Cir. 1993)] and Dunkin v. Louisiana-Pacific Corporation, Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), [cert. denied, 114 S.Ct. 87 (1993)]. The Panel in Deherrera referred this matter to this Discipline Panel because the appeal and petition for writ of mandamus were frivolous. In Casillan v. Regional Transportation District, [986 F.2d 1426 (10th Cir. 1993)], the court also found the appeal to be frivolous. Filing a frivolous appeal is a ground for discipline because it is a violation of 10th Cir. R. 46.5.

The crux of the Deherrera matter was that the respondent had filed a number of interlocutory appeals to the court of appeals on the issue of the validity of sanctions imposed against him by the district court in that case and earlier cases. The law in the Tenth Circuit is that an order imposing sanctions on a lawyer is not a final appealable decision, but is interlocutory so an immediate appeal is not permitted. See G.J.B. & Assocs. V. Singleton, 913 F.2d 824, 827 (10th Cir. 1990). The respondent's twenty-two page answer to the show cause order was filed on October 4, 1993. In it, he asked "to be heard in person in defense and in mitigation with respect to the charges being brought against him . . . ."

The court of appeals set the matter down for a hearing on November 12, 1993, allowing fifteen minutes for oral argument, and directed the respondent to file a supplemental response to the order to show cause addressing why he should not be disciplined for filing a frivolous appeal in Casillan, as referred to in the original show cause order. (The respondent's October 4 response only alluded to the DeHerrera case.)

On October 22, the respondent filed a motion to vacate the November 12 hearing and asked for additional time to file the supplemental response. He also

requested an "evidentiary hearing or designation of a special master for purposes of conducting an evidentiary hearing" (emphasis added), merely stating that his "case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony . . . ." The respondent did not elaborate further on the nature of the evidence he wished to present, nor did he make an offer of proof. He filed a thirty-one page supplemental response to the order to show cause on November 2, 1993, together with another request for an evidentiary hearing without, however, any indication of the nature of the evidence he wished to present. The court of appeals accepted the supplemental response but denied the respondent's motion to vacate the November 12 hearing and his request for an evidentiary hearing.

Oral argument was held as scheduled on November 12, and on November 29, 1993, the court of appeals panel issued its order recognizing that it was bound by the findings of the other court of appeals panels in Deherrera and Casillan that the respondent's appeals in those cases were frivolous, and noting that "[a]t oral argument, respondent admitted that he had not paid any of the sanctions that have been imposed on him by this court or the district court." In re Smith, 10 F.3d 723, 724 (10th Cir. 1993).

Accordingly, the court of appeals ordered that respondent "is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied." Id.

II.

We usually impose the same discipline that was imposed in the other jurisdiction in a reciprocal discipline proceeding unless certain exceptions exist. People v. Meyer, 908 P.2d 123, 124 (Colo. 1995). C.R.C.P. 241.17(d) provides in relevant part:

> At the conclusion of the proceedings brought under this Rule, the hearing panel shall refer the matter to the Supreme Court with the recommendation that the same discipline be imposed by the Supreme Court as was imposed by the foreign jurisdiction unless it is determined by the hearing panel that:
>
> (1) The procedure followed in the foreign jurisdiction did not comport with the requirements of due process of law;
>
> (2) The proof upon which the foreign jurisdiction based its determination of misconduct is so

> infirm that the Supreme Court cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction;
>
> (3) The imposition by the Supreme Court of the same discipline as was imposed in the foreign jurisdiction would result in grave injustice; or
>
> (4) The misconduct proved warrants that a substantially different form of discipline be imposed by the Supreme Court.

The respondent challenges the reciprocal application of the court of appeals order on all four of the above grounds as well as others. In his brief, he raises ten issues that we will address in order.

A.

In his first issue, the respondent claims that the procedure followed in the court of appeals was deficient because he

> was entitled to a full criminal process (including his Sixth Amendment right to a jury trial) before being convicted and punished by the Tenth Circuit for failing to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and by the U.S. District Court.

In the first place, we do not read the court of appeals order as disciplining the respondent for failure to pay the sanctions imposed against him. The respondent was suspended for filing frivolous appeals, as set forth in the show cause order. After admitting at oral argument that he had not paid any of the sanctions imposed against him, however, the court of appeals made satisfaction of the sanctions he had been previously ordered to pay as a condition for reinstatement. See Smith, 10 F.3d at 724. One of the respondent's premises is therefore false.

Second, the complainant points out that the respondent did not raise this precise argument in either the court of appeals or before the hearing board and that it is therefore waived. We nevertheless elect to address it in the context of whether the respondent's due process rights were violated because of the absence of a jury in the court of appeals discipline proceedings, for the purpose of C.R.C.P. 241.17(d)(1).

By its own terms, the Sixth Amendment right to trial by jury applies only to criminal proceedings: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const.

amend. VI. "A lawyer discipline proceeding is not a criminal proceeding . . . ." People v. Morley, 725 P.2d 510, 514 (Colo. 1986) (citation omitted); see also People v. Varallo, 913 P.2d 1, 3 (Colo.) (same), cert. denied, 117 S. Ct. 80 (1996). The respondent has referred us to no authority in Colorado or elsewhere that the Sixth Amendment right to trial by jury applies to lawyer discipline proceedings, and we are aware of none. In fact, other jurisdictions have held that federal and state constitutional provisions regarding the right to trial by jury do not apply to lawyer discipline proceedings. See, e.g., In re Cornelius, 520 P.2d 76, 83 (Alaska 1974); Attorney Grievance Comm'n v. Kerpelman, 420 A.2d 940, 947 (Md. 1980); Mississippi State Bar v. Young, 509 So. 2d 210, 212-13 (Miss. 1987). Our own Rules of Procedure Regarding Lawyer Discipline and Disability Proceedings, C.R.C.P. 241.1 to 241.6, do not authorize trial by jury. The fact that the respondent was not afforded a jury trial in the court of appeals did not violate either the Sixth Amendment or due process.

B.

The respondent's next issue is that the procedure employed by the Tenth Circuit in the disciplinary proceedings did not comport with the requirements of

due process. In particular, the respondent claims that he did not receive fair notice of the charges against him and he was not given an adequate opportunity to be heard in his defense.

First, the respondent asserts that the court of appeals' show cause order did not adequately apprise him of the charges. Integral to his argument is the respondent's position that he was disciplined for failing to pay the sanctions imposed against him and not for filing frivolous appeals. Again, however, we reject the respondent's characterization of the court of appeals action. The order suspending him indefinitely was for filing frivolous appeals in the two cases mentioned in the show cause order and not for failing to pay the sanctions imposed against him. See Smith, 10 F.3d at 724.

Second, the respondent complains that he was given only ten days in which to file his supplemental response to the part of the show cause order pertaining to Casillan. Implicit in this argument is that the original September 15, 1993 order to show cause did not encompass the Casillan appeal as well as the Deherrera appeal. See People v. Emeson, 638 P.2d 293, 294 (Colo. 1981) (noting that In re Ruffalo, 390 U.S. 544 (1968) "clearly states that the consideration of charges not made in the formal complaint

constitutes a violation of the respondent's rights to procedural due process of law.") A fair reading of the September 15 show cause order, however, set out in section (I) above, discloses that the respondent was to answer to the charges that the appeals in both Deherrera and Casillan were frivolous. We therefore conclude that the show cause order did not violate the respondent's due process rights and there was not error in permitting the respondent less than twenty days to supplement his response to address the Casillan appeal.

The respondent also alleges that he was entitled to an evidentiary hearing before the court of appeals disciplinary panel at which he could "present expert testimony and other relevant evidence . . . ." The court of appeals allowed the respondent fifteen minutes of oral argument to respond to its show cause order. The respondent cites Fed. R. App. P. 46 to support his claim that he was entitled to an evidentiary hearing before the disciplinary panel:

> (b) Suspension or Disbarment. When it is shown to the court that any member of its bar . . . has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an

> opportunity to show cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, . . . the court shall enter an appropriate order.
>
> (c) Disciplinary Power of the Court Over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Fed. R. App. P. 46(b), (c). This rule does not grant the respondent the right to the kind of evidentiary hearing that he requested. The respondent was given the right to argue in person why he should not be disciplined. In the first place, his responses to the order to show cause did not identify any reasons for the testimony of any witnesses, much less expert witnesses. Insofar as the respondent's expert evidence and testimony was intended to be relevant to whether the respondent's appeals in Deherrera and Casillan were frivolous or

not, that issue had already been determined by the court of appeals panels deciding those respective appeals, and the disciplinary panel was without the power to reverse or overrule the findings of the other panels in those cases. See Smith, 10 F.3d at 724. The same analysis resolves the appropriateness of the sanctions the respondent was ordered to pay by the court of appeals and the district court. Expert testimony was either irrelevant to the issues before the disciplinary panel or unnecessary because the disciplinary panel was certainly capable of determining and applying the law to the respondent's case without it.

Finally, the respondent advances no relevant or valid reasons why he was denied his right to be heard before a fair and impartial decisionmaker. The questions before the court of appeals disciplinary panel were limited to whether the respondent had filed frivolous appeals in Deherrera and Casillan, and if so, what the appropriate disciplinary sanction should be. The legality and validity of the monetary sanctions previously imposed had been conclusively determined in the previous cases and could not be collaterally attacked in the disciplinary proceeding. See Smith, 10 F.3d at 724.

We find, as did the hearing board, that the Tenth Circuit disciplinary proceedings did not violate due process.

C.

The respondent next contends that the proof upon which the court of appeals based its determination of misconduct was so infirm that this court cannot, consistent with its duty, accept as final the court of appeals' determination. See C.R.C.P. 241.17(d)(2).

In this exception, the respondent focuses on the insufficiency of the proof to show that he willfully failed to pay the sanctions imposed against him and to rebut the defenses presented in his response and supplemental response to the order to show cause. These defenses included that he had been sanctioned for making arguments either warranted under existing law or good faith attempts to extend, modify, or reverse existing law; and that his failure to pay the sanctions imposed against him was not grounds for discipline, especially since he is unable to pay them.

As we said above, the court of appeals disciplinary panel was foreclosed from redetermining whether the respondent's appeals in Deherrera and Casillan were frivolous. See Smith, 10 F.3d at 724. The respondent was not

disciplined for failing to pay the sanctions imposed against him. His defenses were not relevant to the issues before the panel, and we conclude that the proof relied on by the Tenth Circuit was not so infirm to justify this court's disregarding the disciplinary panel's action.

D.

Moving to the reciprocal discipline proceedings below, the respondent charges that these proceedings did not comport with due process of law, and that the assistant disciplinary counsel engaged in prosecutorial misconduct.

First, the respondent argues that the assistant disciplinary counsel had no right to take the respondent's deposition in the reciprocal discipline proceeding because requiring the respondent to be deposed violated his Fifth Amendment right against self-incrimination.

In Spevack v. Klein, 385 U.S. 511 (1967), the Supreme Court held that the Fifth Amendment privilege against self-incrimination afforded protection to the accused lawyer in a disciplinary proceeding. The lawyer in Spevack was deprived of his rights under the Fifth Amendment when he was disbarred solely because he refused to testify in a judicial investigation into his alleged

improper solicitation of clients. 385 U.S. at 514. We noted in People v. Robnett, 859 P.2d 872, 875 (Colo. 1993), that Spevack did not specifically hold, however, that attorney disciplinary proceedings were criminal in nature for purposes of the Fifth Amendment privilege against self-incrimination. Accordingly, most courts and commentators after Spevack have tended to read the decision narrowly, concluding that disciplinary proceedings are not themselves criminal in nature for purposes of the privilege, and have "limit[ed] the scope of the privilege in disciplinary proceedings to only those disclosures that could be used in a criminal prosecution, or that could lead to other evidence that might be so used." II ABA/BNA Lawyers' Manual on Professional Conduct at 101:2402 (1984); see generally Andrea G. Nadel, Annotation, Extent and Determination of Attorney's Right or Privilege Against Self-Incrimination in Disbarment or Other Disciplinary Proceedings - Post-Spevack Cases, 30 A.L.R.4th 243 (1984 & Supp. 1992).

Consistent with this view of Spevack, the California Supreme Court stated:

> An attorney in a State Bar disciplinary matter does not possess the same immunity from being called to testify as a criminal defendant;

> the attorney "may be called upon to testify but may decline to answer questions on the ground that his testimony would tend to incriminate him." (Black v. State Bar (1972) 7 Cal. 3d 676, 688, 103 Cal. Rptr. 288, 499 P.2d 968.)

In re Utz, 769 P.2d 417, 422 (Cal. 1989). Analogously, the hearing board could properly require the respondent to attend his own deposition, at which time he could decline to answer specific questions if invocation of the privilege against self-incrimination was appropriate. The presiding officer of the hearing board was acting within his proper sphere when he ruled on the assistant disciplinary counsel's motions. See C.R.C.P. 241.14(b). Moreover, from the record before us, the respondent did not raise his privilege against self-incrimination in the Tenth Circuit disciplinary proceedings, nor is it obvious why the charges against him for filing frivolous appeals raised the fear of criminal prosecution. Requiring the respondent to attend his own deposition was not an error.

The respondent's second contention is that the assistant disciplinary counsel was guilty of prosecutorial misconduct by asking for sanctions in the event the respondent refused to be

deposed. This objection is baseless and will not be addressed further.

The respondent's final claim is that the board denied him due process when it did not permit the many witnesses, including expert witnesses, to testify at the respondent's hearing. The respondent was not able to justify the calling of these witnesses by means of an offer of proof that they would testify to matters relevant to the reciprocal proceeding. We find that the hearing board quite properly refused to allow the respondent to call these witnesses.

E.

Because the respondent's reciprocal disciplinary proceeding was not a criminal proceeding for purposes of the Sixth Amendment right to a speedy trial, that right was not violated in this case. See In re Briggs, 502 N.E.2d 879, 886 (Ind. 1987).

F.

In his next issue, the respondent argues that the proof before the hearing board was so infirm that this court cannot accept it. While this is a basis for not accepting the determinations of another jurisdiction as to lawyer misconduct and the appropriate sanction, C.R.C.P. 241.17(d)(2), it does not apply to the findings and recommendations of a

hearing board and the supreme court grievance committee hearing panel to this court. Through this exception the respondent attempts to raise the same objections he has already raised, and we have rejected, with regard to the Tenth Circuit disciplinary panel proceedings. This contention is without merit.

G.

The respondent's following two exceptions do not require extended discussion. First, the hearing panel accepted the board's recommendation that the respondent be suspended from the practice of law for nine months; that prior to reinstatement he demonstrate that all sanctions imposed by the court of appeals and the district court have been satisfied and that all federal suspensions have been lifted; and in the event that the respondent meets those conditions prior to the expiration of the nine-month suspension, that this court give favorable consideration to the respondent's immediate reinstatement. Contrary to the respondent's claim, this recommendation does not violate C.R.C.P. 241.17(d) because it does not recommend a harsher discipline against the respondent than the Tenth Circuit's indefinite suspenion. The definite period of suspension, in this case nine months, is mandated by requirement that all suspension be of definite length in

Colorado, not to exceed three years. See C.R.C.P. 241.7(2). The board's provision that the court give favorable consideration to the respondent's immediate reinstatement if he meets the conditions imposed by the Tenth Circuit, prevents the recommendation from even theoretically violating C.R.C.P. 241.17(d).

Second, the respondent asserts that his due process rights were violated because one of the members of the hearing panel that reviewed the board's action was the presiding officer of the board. We rejected the identical contention in People v. Fitzgibbons, 909 P.2d 1098, 1100-01 (Colo. 1996).

H.

According to the respondent, imposition by the supreme court of the same discipline against him as was imposed by the Tenth Circuit would result in a grave injustice. See C.R.C.P. 241.17(d)(3). The respondent advances no reasons for this proposition, except that under Colorado law a suspension from the practice of law may not be for an indefinite period. This is probably inconsistent with his argument that the sanction recommended by the hearing board is invalid because it is harsher than that imposed by the Tenth Circuit. In any event, the hearing board's

recommendation that the respondent's nine-month suspension be lifted in the event he satisfies the federal sanctions and the Tenth Circuit suspension has been lifted does not violate C.R.C.P. 241.7 at all.

In conclusion, the respondent alleges that "[t]he misconduct proved warrants that a substantially different form of discipline be imposed by the Supreme Court." C.R.C.P. 241.17(d)(4). It is true that we cannot impose an indefinite suspension on the respondent under our rules. The hearing board attempted therefore to fashion a sanction authorized by our rules and which has an effect similar if not identical to the sanctions imposed by the court of appeals.

We note that in People v. Hartman, 744 P.2d 482 (Colo. 1987), we suspended a lawyer for six months in a reciprocal discipline matter for filing frivolous pleadings in three cases in the United States Tax Court. We conclude that the hearing board's recommendation is a reasonable solution to the problem of the minor incompatibility between federal and state disciplinary procedures. We decline the respondent's invitation to retry the reasonableness of the monetary sanctions imposed by the district court and the court of appeals in cases other than the one before us. Accordingly, we

accept the hearing panel's and hearing board's recommendations.

III.

It is hereby ordered that David Lee Smith be suspended from the practice of law for nine months, effective thirty days after the opinion is issued. It is also ordered that the respondent pay the costs of these proceedings in the amount of $1,863.43 within ninety days from the date on this opinion. It is further ordered that prior to reinstatement the respondent demonstrate that all sanctions imposed by the court of appeals and the district court have been satisfied and that all federal suspensions have been lifted; and in the event that the respondent meets these conditions prior to the expiration of the nine-month suspension, the respondent may petition this court for immediate reinstatement.

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SA306
RECIPROCAL PROCEEDING IN DISCIPLINE,
GC 94B-80

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RESPONDENT'S VERIFIED MOTION FOR ORDER REINSTATING HIM TO THE PRACTICE OF LAW IN THE STATE OF COLORADO DESPITE THE FACT THAT IT IS IMPOSSIBLE FOR HIM TO COMPLY WITH THE COLORADO SUPREME COURT'S (MARCH 3, 1997) OPINION OR TO FILE WITH COMMITTEE COUNSEL THE AFFIDAVIT REQUIRED BY C.R.C.P. 241.22(b)

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THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

DAVID LEE SMITH,

Respondent.

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COMES NOW the respondent, David Lee Smith ("Mr. Smith"), and files his Verified Motion for Order Reinstating Him to the Practice of Law in the State of Colorado Despite the Fact that it is Impossible for Him to Comply With the Colorado Supreme Court's (March 3, 1997) Opinion or to File With Committee Counsel the Affidavit Required by C.R.C.P.

241.22(b); and as grounds therefor, states as follows:

1. On November 29, 1993, the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Chief Tenth Circuit Judge Stephanie K. Seymour and Tenth Circuit Judges Bobby R. Baldock and Wade Brorby) issued its order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals of sanction orders issued by the United States District Court for the District of Colorado to the Tenth Circuit in four federal civil rights cases, and for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the District Court. See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been "satisfied." See id. On January 3, 1994, the Tenth Circuit and its disciplinary panel issued their order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order without addressing the

arguments raised by him therein or giving any reasons for their decision. On July 18, 1995, the Tenth Circuit disciplinary panel issued its order denying Mr. Smith's motion to vacate its (November 29, 1993) suspension order without addressing the arguments raised by him therein or giving any reasons for its decision. Mr. Smith's petition for rehearing and suggestion for rehearing en banc (filed on August 1, 1995) of the Tenth Circuit disciplinary panel's (July 18, 1995) order is still pending before the Tenth Circuit disciplinary panel. As a part of his efforts to persuade the Tenth Circuit and its disciplinary panel to review, reconsider and correct the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order, Mr. Smith submitted affidavits and other evidentiary materials showing that he is financially unable to pay all or any part of the more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the District Court.[7]



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[7]At the time of the submission of these evidentiary materials, Mr. Smith had a negative net worth of more than $360,000.00. Currently, Mr. Smith has a negative net worth of more than $400,000.00. Due to his indefinite suspension from the practice of law in the federal and state courts, Mr. Smith has no income from which his negative net worth could be reduced.

2. On January 17, 1995, United States District Judge Edward W. Nottingham issued his memorandum opinion and order refusing to dismiss Dunkin v. Louisiana-Pacific Corporation, et al., Civil Action No. 92-N-243 (D. Colo.) on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement that the harsh and unjustified sanctions of more than $25,000.00 previously imposed against Mr. Smith by Judge Nottingham would be vacated and/or dismissed with prejudice nunc pro tunc to the date of their imposition. On June 12, 1996, the Tenth Circuit issued its order and judgment affirming Judge Nottingham's (January 17, 1995) memorandum opinion and order without addressing the arguments made by Mr. Smith in his opening brief or giving any reasons for its decision. On August 19, 1996, Judge Nottingham issued his order requiring Mr. Smith "to pay the sanctions imposed in this case within ten days of the date of this order." This order was issued despite the fact that these sanctions had already been settled by the parties and their attorneys in a legally binding settlement agreement in which Mr. Smith had been released from payment of these sanctions to the opposing parties as a part of the consideration for the settlement of the underlying case. On July 28, 1997, the Tenth Circuit issued its order and

judgment affirming Judge Nottingham's (August 19, 1996) order without addressing the arguments made by Mr. Smith in his opening brief or giving any reasons for its decision. On September 24, 1997, the Tenth Circuit issued its order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 28, 1997) order and judgment without addressing the arguments raised by him therein or giving any reasons for its decision.

3. On January 30, 1995, United States District Judge Lewis T. Babcock issued his order refusing to dismiss DeHerrera v. City and County of Denver, et al., Civil Action No. 90-B-2260 (D. Colo.) on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement that the harsh and unjustified sanctions of more than $10,000.00 previously imposed against Mr. Smith by Judge Babcock would be vacated and/or dismissed with prejudice nunc pro tunc to the date of their imposition. On June 12, 1996, the Tenth Circuit issued its order and judgment affirming Judge Babcock's (January 30, 1995) order without addressing the arguments raised by Mr. Smith in his opening brief or giving any reasons for its decision. On August 8, 1996, the Tenth Circuit issued its order denying Mr. Smith's petition for

rehearing and suggestion for rehearing en banc of its (June 12, 1996) order and judgment without addressing the arguments raised by him therein or giving any reasons for its decision.

4. On February 10, 1995, the three-judge disciplinary panel of the United States District Court for the District of Colorado (composed of United States District Judges Zita L. Weinshienk, Edward W. Nottingham and Daniel B. Sparr) issued its order indefinitely suspending Mr. Smith from the practice of law in the District Court based on the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order. On February 16, 1996, the Tenth Circuit issued its order denying Mr. Smith's appeal of the District Court disciplinary panel's (February 10, 1995) suspension order without addressing the arguments raised by him in his opening brief or giving any reasons for its decision. On April 2, 1996, the Tenth Circuit issued its order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (February 16, 1996) order affirming the District Court disciplinary panel's (February 10, 1995) suspension order without addressing the arguments raised by him therein or giving any reasons for its decision.

5. On December 7, 1995, Mr. Smith filed an independent action in the United States District Court for the District of

Colorado, naming the Regional Transportation District ("RTD") and three attorneys associated with the RTD as defendants, and seeking relief from final judgments, orders and/or proceedings in Casillan v. Regional Transportation District, et al., Civil Action No. 90-S-1722 (D. Colo.) and In re David L. Smith, Disciplinary Action No. 93-DP-28 (D. Colo.).[8] Specifically, Mr. Smith

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[8]The three attorneys (Patricia A. Coan, Sally Z. Wheeler, and Lynne L. Hicks) named in the lawsuit were the personal beneficiaries of more than $15,000.00 in harsh and unjustified sanctions previously imposed against Mr. Smith in Casillan. Mr. Smith's inability to pay these harsh and unjustified sanctions was part of the alleged basis for the discipline (i.e., indefinite suspension from the practice of law in the District Court) imposed against him in In re David L. Smith.

On December 19, 1995, Ms. Coan (now employed as a United States Magistrate Judge) wrote a letter to the Office of Disciplinary Counsel of the Colorado Supreme Court, alleging inter alia that by filing his (December 7, 1995) lawsuit, Mr. Smith had violated Rule 241.25(e) of the Colorado Rules of Procedure Regarding

requested an order or judgment declaring that the final judgments, orders and/or proceedings in Casillan and In re David L. Smith were null and void ab initio; declaring that after McKnight v. General Motors Corp., 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (per curiam), it was no longer equitable that the final judgments, orders and/or proceedings in Casillan and In re David L. Smith should have prospective application; and granting an injunction prohibiting United States District Judge Daniel B. Sparr from proceeding in excess of the jurisdiction delegated to him by the hearing panel of the United States Court of Appeals for the Tenth Circuit in its (January 3, 1993) order remanding Casillan to him "for a determination of reasonable attorney fees for each defendant for defending this appeal," and from proceeding in excess of the jurisdiction delegated to him by Rule 105A of the Local Rules of Practice of the United States District Court for the District of Colorado. Mr. Smith requested his costs and attorney fees (including expert witness fees), and such other and further legal and equitable



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Lawyer Discipline and Disability Proceedings. This clearly frivolous and groundless matter is currently pending before the Colorado Supreme Court in People v. Smith, Case No. 97SA344.

relief as may be just under the circumstances, including an order granting an expedited jury trial on the merits of plaintiff John Casillan's improperly dismissed civil rights case. Jurisdiction was based on Fed. R. Civ. P. 57 and 60(b), and 28 U.S.C. §§ 1331, 1367 and 2201. Mr. Smith demanded a trial by jury of all issues so triable. This case is still pending before United States District Judge William F. Downes, who has failed or refused to rule on pending matters and set the case for trial.[9]

6. On February 18, 1997, Chief Tenth Circuit Judge Stephanie K. Seymour issued her order denying Mr. Smith's petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence with respect to the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order without granting a hearing, addressing the arguments raised by him therein, or giving any reasons for her decision. On May 8, 1997, Tenth Circuit Judges David M. Ebel and Mary Beck Briscoe issued their order denying Mr. Smith's petition



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[9]On January 31, 1997, Judge Downes held a telephone status conference at which he promised to rule on pending matters "within a week to ten days." However, as of the date (February 4, 1998) of the filing of this motion, no ruling has been made.

for a writ of mandamus or prohibition with respect to the letter refusal by Patrick Fisher, Clerk of the Tenth Circuit, and Elisabeth A. Shumaker, Chief Deputy Clerk, to accept for filing his notice of appeal of Chief Tenth Circuit Judge Seymour's (February 18, 1997) order without addressing the arguments raised by him therein or giving any reasons for their decision.

7. On March 3, 1997, the Colorado Supreme Court issued its opinion (effective June 6, 1997) suspending Mr. Smith from the practice of law in the State of Colorado for nine months based on the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order. See People v. Smith, 937 P.2d 724 (Colo.), cert. denied, ____ U.S. ____, 118 S.Ct. 158, ____ L.Ed.2d ____ (1997). Prior to reinstatement, Mr. Smith must demonstrate that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted. See id. In its (March 3, 1997) opinion, the Colorado Supreme Court rejected inter alia Mr. Smith's argument that the discipline imposed against him constitutes an indefinite suspension from the practice of law in the State of Colorado, in violation of C.R.C.P. 241.7(2).

8. On January 21, 1998, United States District Judge Wiley Y. Daniel issued his order of dismissal dismissing Mr. Smith's petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence with respect to the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order without granting a hearing, addressing the arguments raised by him therein, or giving any reasons for his decision. This order of dismissal is currently on appeal to the Tenth Circuit.

9. Since it is clear from the facts set forth in the foregoing paragraphs 1-8 that despite the fact that Mr. Smith's arguments are meritorious, the federal judiciary has no intention of reviewing, rehearing, reconsidering, amending, modifying, vacating, or correcting the harsh and unjustified sanctions and discipline imposed against him by the Tenth Circuit, the District Court and their disciplinary panels, it is impossible for him to demonstrate prior to reinstatement that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted, as required by the Colorado Supreme Court in its (March 3, 1997) opinion. It therefore follows that it is impossible for Mr.

Smith to comply with the Colorado Supreme Court's (March 3, 1997) opinion or to file with Committee Counsel the affidavit required by C.R.C.P. 241.22(b).[10]

WHEREFORE, Mr. Smith requests the Colorado Supreme Court to grant his Verified Motion for Order Reinstating Him to the Practice of Law in the State of Colorado Despite the Fact that it is Impossible for Him to Comply with the Colorado Supreme Court's (March 3, 1997) Opinion or to File With Committee Counsel the Affidavit Required by C.R.C.P. 241.22(b), and such other and further relief as may be just under the circumstances.

Dated this 4th day of February, 1998.



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[10]Under C.R.C.P. 241.22(b), ". . . a lawyer who has been suspended for a period of one year or less shall be reinstated by order of the Supreme Court, provided the lawyer files with the Committee Counsel within 30 days prior to the expiration of the period of suspension an affidavit stating that the lawyer has fully complied with the order of suspension and with all applicable provisions of this Chapter."

Respectfully submitted,

David L. Smith, #6934
Pro Se Attorney-Respondent
1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

VERIFICATION

STATE OF COLORADO )
) ss.
CITY AND COUNTY OF DENVER )

I, David L. Smith, hereby verify that the information set forth in the foregoing Respondent's Verified Motion for Order Reinstating Him to the Practice of Law in the State of Colorado Despite the Fact that it is Impossible for Him to Comply with the Colorado Supreme Court's (March 3, 1997) Order or to File With Committee Counsel the Affidavit Required by C.R.C.P. 241.22(b) is true and correct to the best of my knowledge, information and belief.

David L. Smith, #6934
Pro Se Attorney-Respondent
1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

Subscribed and sworn to before me by David L. Smith on this 4th day of February, 1998.

Witness my hand and official seal.

_____

Notary Public

## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 1998, true and correct copies of the foregoing Respondent's Verified Motion for Order Reinstating Him to the Practice of Law in the State of Colorado Despite the Fact that it is Impossible for Him to Comply with the Colorado Supreme Court's (March 3, 1997) Order or to File With Committee Counsel the Affidavit Required by C.R.C.P. 241.22(b) were hand delivered to:

James P. Hollaway, Esq.
Committee Counsel
600 17th Street, Suite 920 - South
Denver, Colorado 80202

James C. Coyle, Esq.
Assistant Disciplinary Counsel
600 17th Street, Suite 510 - South
Denver, Colorado 80202

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SA306
RECIPROCAL PROCEEDING IN DISCIPLINE

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ORDER OF COURT

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THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

DAVID LEE SMITH,

Respondent.

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Upon consideration of Respondent's Verified Motion for Order Reinstating Him to the Practice of Law in the State of Colorado Despite the Fact that it is Impossible for Him to Comply With the Colorado Supreme Court's (March 3, 1997) Opinion or to File With Committee Counsel the Affidavit Required by C.R.C.P. 241.22(b), and the Complainant's Response thereto filed in the above captioned matter, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Respondent's Verified Motion shall be, and the same hereby is, DENIED.

BY THE COURT, FEBRUARY 11, 1998.

cc: James C. Coyle
Asst. Disciplinary Counsel
600 17th Street, Suite 510 S.
Denver, CO 80202

David Lee Smith
1630 Welton Street, #300
Denver, CO 80202

James P. Hollaway
Grievance Committee Counsel
600 17th St., Suite 920 S.
Denver, CO 80202-5435

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SA306
RECIPROCAL PROCEEDING IN DISCIPLINE,
GC94B-80

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PETITION FOR REHEARING

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THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

DAVID LEE SMITH,

Respondent.

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On February 11, 1998, the Colorado Supreme Court issued its order (a copy of which is attached hereto) denying Respondent's Verified Motion for Order Reinstating Him to the Practice of Law in the State of Colorado Despite the Fact That it is Impossible for Him to Comply With the Colorado Supreme Court's (March 3, 1997) Opinion or to File With Committee Counsel the Affidavit Required by C.R.C.P. 241.22(b) (filed on February 4, 1998) without addressing the arguments raised by him therein or giving any reasons for its decision. In his (February 4, 1998) motion, Mr. Smith said:

. . .

9. Since it is clear from the facts set forth in the foregoing paragraphs 1-8 that despite the fact that Mr. Smith's arguments are meritorious, the federal judiciary has no intention of reviewing, rehearing, reconsidering, amending, modifying, vacating, or correcting the harsh and unjustified sanctions and discipline imposed against him by the Tenth Circuit, the District Court and their disciplinary panels, it is impossible for him to demonstrate prior to reinstatement that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted, as required by the Colorado Supreme Court in its (March 3, 1997) opinion. It therefore follows that it is impossible for Mr. Smith to comply with the Colorado Supreme Court's (March 3, 1997) opinion or to file with Committee Counsel the affidavit required by C.R.C.P. 241.22(b).[11]

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[11]Under C.R.C.P. 241.22(b), ". . . a lawyer who has been suspended for a period of one year or less shall be reinstated by order of the Supreme Court, provided the lawyer files with the Committee Counsel within 30 days prior to the expiration of the period of suspension an affidavit stating that the

By denying Mr. Smith's (February 4, 1998) motion without addressing the arguments raised by him therein or giving any reasons for its decision, the Colorado Supreme Court has arbitrarily deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. See Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 1331, 129 L.Ed.2d 336 (1994); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Further, the Colorado Supreme Court has arbitrarily deprived Mr. Smith of his First and Fourteenth Amendment right to access to the courts to petition the government for a redress of grievances. See id. Since no other attorney has been suspended indefinitely from the practice of law in the State of Colorado based on his financial inability to pay harsh and unjustified sanctions imposed against him by the federal courts,[12] the Colorado

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lawyer has fully complied with the order of suspension and with all applicable provisions of this Chapter."

[12]As a part of his efforts to persuade the Tenth Circuit and its disciplinary panel to review, reconsider

Supreme Court has also arbitrarily deprived Mr. Smith of his Fourteenth Amendment right to the equal protection of the laws. See id. Finally, since no legal or factual basis exists for the Colorado Supreme Court's (February 11, 1998) order, it is reasonably questionable whether the Colorado Supreme Court can be a fair and impartial decision-maker in this or any other

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and correct the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order, Mr. Smith submitted affidavits and other evidentiary materials showing that he is financially unable to pay all or any part of the more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the District Court. At the time of the submission of these evidentiary materials, Mr. Smith had a negative net worth of more than $360,000.00. Currently, Mr. Smith has a negative net worth of more than $400,000.00. Due to his indefinite suspension from the practice of law in the federal and state courts, Mr. Smith has no income from which his negative net worth could be reduced, or from which harsh and unjustified sanctions of more than $50,000.00 could be paid.

disciplinary case against Mr. Smith.[13] See Canon 3 of the Colorado Code of Judicial Conduct; Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decision-maker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decision-maker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decision-maker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). Under these circumstances, Mr. Smith requests the Colorado Supreme Court to grant his petition for rehearing of its (February 11, 1998) order, and

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[13]Other disciplinary cases against Mr. Smith are: People v. Smith, Case No. 97SA344 and People v. Smith, Case No. 98SA8.

such other and further relief as may be just under the circumstances, including an order disqualifying itself from this and the other disciplinary cases against him.

Dated this 17th day of February, 1998.

Respectfully submitted,

David L. Smith, #6934
Pro Se Attorney-Respondent
1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 1998, true and correct copies of the foregoing Petition for Rehearing were placed in the United States mail, postage prepaid, addressed as follows:

James P. Hollaway, Esq.
Committee Counsel
600 17th Street, Suite 920 - South
Denver, Colorado 80202

James C. Coyle, Esq.
Assistant Disciplinary Counsel
600 17th Street, Suite 510 - South
Denver, Colorado 80202

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SA306
ORIGINAL PROCEEDING IN DISCIPLINE

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ORDER OF COURT

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THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

DAVID LEE SMITH,

Respondent.

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Upon consideration of the Petition for Rehearing filed in the above captioned matter, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, FEBRUARY 19, 1998.

cc: James C. Coyle
Asst. Disciplinary Counsel
600 17th Street, Suite 510 S.
Denver, CO 80202

David Lee Smith
1630 Welton Street, #300
Denver, CO 80202

James P. Hollaway
Grievance Committee Counsel
600 17th St., Suite 920 S.
Denver, CO 80202-5435